ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
KAREN R. BAKER, JUDGE

DIVISION I

CA06-738

May 9, 2007

ROYAL OAKS VISTA, L.L.C., and JOHN HAWKS
APPELLANTS

v.

JAMES MADDOX, et al.
APPELLEES

AN APPEAL FROM CLEBURNE COUNTY CIRCUIT COURT
[No. CIV 2005-187-2]

HONORABLE JOHN NORMAN HARKEY, CIRCUIT JUDGE

AFFIRMED

This appeal concerns the validity and enforcement of a bill of assurance for Royal Oaks Vista subdivision filed in 1972 and an attempted replat of the subdivision 2004. The circuit court found that the 2004 replat was invalid and enforced the restrictions contained in the original bill of assurance. The trial court also ordered the removal of all structures built in violation of the restrictions. Appellant Royal Oaks Vista, LLC, (Roy) asserts in its single point on appeal that the trial court erred in finding that the replat was invalid.[1] We affirm.

In January 1972, a plat and a bill of assurance were filed for Royal Oaks Vista subdivision located in Cleburne County. The plat laid out twenty-one lots and streets for the subdivision. The bill of assurance provided, among other things, that all lots shall be residential

[1]John Hawks, Jr., is also listed as an appellant in this case. He is a principal in ROV and is listed as the record owner of some of the replatted lots. For convenience, we refer to ROV and Hawks collectively as ROV.

lots and that no lots shall be resubdivided. The bill also contained the following provision: "No noxious or offensive trade or activity shall be carried on upon any lot, nor shall anything be done thereon which may be or become an annoyance to the neighborhood."

Appellee Lynn Rice and her then-husband acquired Lot 1 in the subdivision in 1987. Rice acquired sole ownership of the lot in 1997. In April 1993, appellees Joan and James Maddox purchased Lots 2, 3, and 4 in the subdivision. ROV acquired the remaining lots (lots 5 through 21) by deed dated August 12, 2004. On August 18, 2004, ROV filed both a replat of the subdivision and an amended bill of assurance for the new subdivision. The replat created lots 7 through 18 and a lot 56 from lots 5 through 21 of the original subdivision.

While ROV was preparing the replat and bill of assurance, it was also proceeding with the development of streets and other infrastructure in the subdivision. It also proceeded with the sale of four lots. Among the lots sold by ROV was Replatted Lot 8, which was sold to David Tindall. Tindall built a house on Replatted Lot 8, which was later conveyed to appellees Mary and Gary Yeager. The Maddoxes and Rice became aware of ROV's activities during June, July, and August 2004, when ROV was seeking to have the original streets in the subdivision declared abandoned by the Greers Ferry City Council. The city council granted ROV's request in August 2004.

The Maddoxes, Rice, and the Yeagers filed a complaint, later amended, seeking injunctive relief and damages against ROV on September 20, 2005. They asserted that the replat and new bill of assurance were in violation of the original bill of assurance's prohibition against resubdividing lots. The Yeagers added an additional claim for damages against David Tindall, contending that, if the Maddoxes and Rice were successful in their claim against

ROV, Tindall breached the warranties in the deed conveying the property to the Yeagers, which was after the replat and new bill of assurance were filed.

ROV denied the material allegations of the complaint. It also asserted that the original bill of assurance violated the rule against perpetuities and was an unreasonable restraint on alienation, as well as the affirmative defenses of laches, waiver, and estoppel. ROV also filed a counterclaim for declaratory relief, asserting that the original bill of assurance was an unreasonable restraint on alienation.

After a hearing, the trial court found that ROV's replat was in violation of the original bill of assurance. The court also found that the defense of laches did not apply and that the rule against perpetuities was not violated. The trial court granted the request for an injunction. Finally, the court ordered that the original bill of assurance would control the subdivision. The trial court's written ruling was entered on April 27, 2006. In its written order, the court found that many of the improvements, such as electrical and water lines, as well as road grading, were completed by the end of August 2004, shortly after the replat. The court noted that ROV's actions in proceeding with construction were "precipitous" in view of the original restrictions. ROV was ordered to remove any structures built in violation of the restrictive covenants. The court specifically reserved the claims of Mary and Gary Yeager. This appeal followed.[2]

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[2]Although the order appealed from specifically reserves the Yeagers's claims and does not contain an Ark. R. Civ. P. 54(b) certification, this case is nevertheless appealable under the provisions of Ark. R. App. P. 2(a)(6) in that the order granted an injunction directing ROV to remove the structures found to be in violation of the restrictive covenants. *See Crain v. Burns*, 82 Ark. App. 88, 112 S.W.3d 371 (2003); *Jaraki v. Cardiology Assocs. of Northeast Ark.*, 75 Ark. App. 198, 55 S.W.3d 799 (2001).

At issue in this case is interpretation of a protective or restrictive covenant on the use of land. Restrictions upon the use of land are not favored in the law. *Forrest Constr. Co., Inc. v. Milam*, 345 Ark. 1, 43 S.W.3d 140 (2001); *Faust v. Little Rock Sch. Dist.*, 224 Ark. 761, 276 S.W.2d 59 (1955). Further, a restrictive covenant will be strictly construed against limitations on the free use of land. *Forrest*, *supra*; *Casebeer v. Beacon Realty, Inc.*, 248 Ark. 22, 449 S.W.2d 701 (1970). All doubts are resolved in favor of the unfettered use of land. *Forrest*, *supra*; *Casebeer*, *supra*.

Any restriction on the use of land must be clearly apparent in the language of the asserted covenant. *Forrest*, *supra*. Where the language of the restrictive covenant is clear and unambiguous, application of the restriction will be governed by our general rules of interpretation; that is, the intent of the parties governs as disclosed by the plain language of the restriction. *Id.*; *Clifford Family Ltd. Liab. Co. v. Cox*, 334 Ark. 64, 971 S.W.2d 769 (1998).

ROV argues in a single point that the trial court erred in not applying the doctrine of laches. In *Summit Mall Co. v. Lemond*, 355 Ark. 190, 206, 132 S.W.3d 725, 735 (2003), our supreme court explained:

> This court has summarized the laches defense by stating that it is based on the equitable principle that an unreasonable delay by the party seeking relief precludes recovery when the circumstances are such as to make it inequitable or unjust for the party to seek relief now. The laches defense requires a detrimental change in the position of the one asserting the doctrine, as well as an unreasonable delay by the one asserting his or her rights against whom laches is invoked.

(Citations omitted.) In the application of the doctrine of laches, each case depends on its particular circumstances. *Self v. Self*, 319 Ark. 632, 893 S.W.2d 775 (1995). The issue of laches is one of fact. *Id.* A reviewing court does not reverse the trial court's decision on a question of fact unless it is clearly erroneous. *Id.*

ROV's argument is that Rice and the Maddoxes were aware of the replat and new bill of assurance in July and August 2004 yet did not file suit until September 2005. In support of its argument, ROV relies on the following testimony from appellees Lynn Rice and James Maddox. Rice was the Recorder/City Treasurer for the City of Greers Ferry during the summer of 2004 and, as such, was aware of ROV's request to have the streets declared abandoned. She further testified that work began in June 2004, clearing trees, building roads, and installing electrical and water lines. She said that she realized that the bill of assurance for the subdivision was being violated. According to Rice, much of the work, including one house, was completed by August 2004. Rice said that, at that time, she "just kind of watched the development," but did not take any action because she did not have the funds to do so and that it appeared from the replat that she and the Maddoxes were no longer in the subdivision.

James Maddox testified that he first became aware of the work when he saw a survey crew. He stated that one house, as well as other work, had been completed by the time the city council voted to abandon the original subdivision streets in August 2004. He said that he was unaware when the work started that it would not be done according to the original plat.

The trial court correctly declined to apply the doctrine of laches because the doctrine is founded on the principle of detrimental reliance, and there is no evidence that ROV incurred any expenses or otherwise relied to its detriment on Rice and the Maddoxes' one-year delay in asserting their rights under the bill of assurance. *See generally McGhee v. Witcher*, 81 Ark. App. 255, 101 S.W.3d 262 (2003). Here, the prejudice ROV cites was the expenditure of approximately $200,000 on the infrastructure. However, the trial court found,

and ROV does not directly dispute, that most of this work was completed by the end of August 2004, shortly after the replat and new bill of assurance were filed. Even if suit had been promptly filed in September 2004, instead of September 2005, ROV would have already spent the money on the project. ROV took the risk of proceeding prior to the time that it filed its replat and bill of assurance, and without having obtained the consent of the other landowners, as required by Ark. Code Ann. § 18-12-103. We cannot say that the trial court was clearly erroneous in not applying the doctrine of laches in this case.

As a subpoint, ROV next argues that the trial court erred in ruling that the temporary septic easement across Lot 56 violates the restrictive covenants. The argument is that the temporary septic easements and Lot 56 are necessary and "incidental to the residential use of the lot." In its ruling, the trial court relied on the supreme court's decision in *Hays v. Watson*, 250 Ark. 589, 466 S.W.2d 272 (1971), where the supreme court affirmed an injunction prohibiting the use of a lot subject to restrictive covenants as a septic system to serve an adjacent mobile home park. ROV attempts to distinguish *Hays* on the basis that the septic system in that case was intended to serve property outside the area covered by the restrictions. However, such a distinction is not persuasive because it is how the lots within the subdivision are used rather than where the benefits of that use are realized that is important. In both cases, the important fact is that one lot subject to restrictions was to be used solely for a septic system for several other lots. ROV also argues that the restrictions in the present case are not the same as those in *Hays*. It is true that the restrictions in *Hays* go farther than those in the present case in that they specifically prohibited lots from being used or maintained as a dumping ground for rubbish, trash, garbage or other waste and also prohibited more than one

septic system per lot. However, Lot 56 of the replatted subdivision is not being used as a residential lot; it is being used as a community septic system. The restrictive covenants in both the original bill of assurance and in the new bill of assurance provide that all lots shall be used as residential lots. Further, the septic system on Lot 56 could violate the prohibition against noxious or offensive activities that could become an annoyance to the neighborhood because many people would find a community septic system behind their house to be offensive.

In the alternative, ROV argues that the covenant restricting the use of the lots to residential purposes is an unreasonable restraint on the alienation of property. ROV relies on *Metropolitan Dade County v. Sunlink Corp.*, 642 So. 2d 551 (Fla. Ct. App. 1993), in support of its argument. However, that case is distinguishable from the present case because there was a specific covenant that prevented the industrial property from being sold to any entity not owned, controlled by, or affiliated with AT&T. Here, there is no such restriction limiting the persons or entities to whom the land could be conveyed.

ROV also relies on *City of Little Rock v. Joyner*, 212 Ark. 508, 206 S.W.2d 446 (1947), to support the argument that conditions have changed and it would be oppressive and inequitable to enforce the restriction because, without using Lot 56, ROV cannot sell the other lots in the subdivision. However, it is not oppressive or inequitable to give effect to the instant restrictions. The requirements that the lots be used only for residential purposes and that no noxious or offensive activity be carried out in the subdivision simply does not injure anyone owning property in the subdivision because all are subject to those covenants. *See Cochran v. Bentley*, __ Ark. __, __ S.W.3d __ (Mar. 7, 2007). ROV was aware of the conditions and the requirements for two septic systems when it purchased the property. The

fact that it cannot proceed with its plans does not mean that conditions have changed so as to justify modification or elimination of the restrictions.

Affirmed.

GLOVER and MILLER, JJ., agree.